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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/902,321	07/10/2001	Michael Lee Vatter	8160	8449
27752	7590	01/26/2009	EXAMINER	
THE PROCTER & GAMBLE COMPANY			YU, GINA C	
Global Legal Department - IP			ART UNIT	PAPER NUMBER
Sycamore Building - 4th Floor				1611
299 East Sixth Street				
CINCINNATI, OH 45202				
			MAIL DATE	DELIVERY MODE
			01/26/2009	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/902,321	VATTER ET AL.
	Examiner GINA C. YU	Art Unit 1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) Responsive to communication(s) filed on 05 November 2007.
- 2a) This action is FINAL.                            2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) Claim(s) 1-14 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-14 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) Notice of Informal Patent Application
- 6) Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application before board decision. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on November 5, 2007 has been entered.

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**Claims 1-10 and 12-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tachibana et al. (5,412,004) in view of Tchinnis et al. (US 6379682).**

Tachibana is directed to the manufacture of paste-like silicone compositions that can be used in water-in-oil cosmetic emulsions (title and abstract, in a water-in-oil emulsion, water is the discontinuous phase and oil is the continuous phase). Applicant discloses at page 5, lines 4- 11 and page 6, lines 12-14 that the emulsifying crosslinked siloxane elastomers are those disclosed by Tachibana. The water-in-oil cosmetic emulsion of Tachibana may contain various components in the discontinuous phase such as saccharides, sugar alcohols, inorganic salts, polyoxyalkylene-modified organopolysiloxane emulsifiers (surfactants) and cosmetic powders, such as talc,

kaolin, mica, titanium dioxide, zinc oxide, red iron oxide, and others (col. 3, line 55 to col. 4, line 18, and Col. 10, line 61-Col. 11, line 6). For solids such as organically modified montmorillonite clay, see col. 8, lines 38-47. For sorbitol, a polyhydric alcohol of claim 4, see col. 9, lines 28-29. For dimethicone copolyol emulsifier, see col. 9, line 38 to col. 10, line 53.

For additional solids and fillers, see col. 10, line 57 to col. 11, line 6. For preservatives and skin conditioning agents such as moisturizers, which encompasses emollients, see col. 11, lines 53- 57. See examples 15-27 for preservatives and forms of the compositions such as foundation, eye shadow, and rouge (blusher).

Tachibana discloses at col. 7, lines 33-39 that the paste-like composition comprises 100 parts by weight of the silicone polymer (emulsifying siloxane elastomer) and 10-1000 parts by weight of a silicone oil. This is equivalent to 9-90 wt.% of each of the components, which overlaps the instantly claimed percent ranges of claim 14.

Tachibana does not teach the droplet size distribution range of the discontinuous phase and the average particle size of the emulsifying crosslinked siloxane elastomer. The droplet size of the discontinuous phase is a function of the emulsifier and its concentration used in an emulsion, and may also be affected by the process of making the emulsion. See Tchinnis et al. (US 6379682 B1). It is viewed that an emulsion made as according to the teachings and suggestions of the Tachibana reference would result in the claimed composition, since the reference teaches all the claimed components including the emulsifying crosslinked silicone elastomer of the claimed

invention, to make a multiphase emulsion. The resulting droplet size distribution of the composition would have been obviously observed to the skilled artisan.

Applicant asserts that the claimed composition results in unexpected droplet size. However, the argument is not commensurate with the scope of the claims because the claim is not limited to any specific weight amount of the components and is open to include other emulsifying agents other than emulsifying crosslinked silicone elastomer.

Applicants admit at page 20, lines 8-13 that the compositions may be aerated by hand or mechanical mixing as well as any conventional form of foaming or whipping. Thus it is viewed that it is obvious that simple stirring would incorporate an amount of air of at least 1% in the compositions. The compositions of Tachibana necessarily contain at least about 1% air as instantly claimed. Burden is shifted to Applicant to show that the compositions of Tachibana do not contain the instantly claimed amount of air.

**Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Tachibana and Tchinnis as applied to claims 1-10, 12-14 as above, and further in view of Hawley, G.G., The Condensed Chemical Dictionary, 10<sup>th</sup> Ed., Van Nostrand Reinhold Co, New York (1981) pages 121,385, 434 and 686.**

Tachibana teaches all the limitations of the claims as stated in the 35 USC 103(a) rejection above. It does not teach the preservatives of instant claim 11. Tachibana does teach that the composition contains preservatives. The preservatives of instant claim 11 are conventional substances used in the cosmetic art.

According to Hawley, disodium ETA, phenoxyethanol and methylparaben are all known preservatives. Benzyl alcohol is also known for use in cosmetics.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to add anyone of the preservatives above to the composition of Tachibana for their known antimicrobial effects.

***Oath/Declaration***

Declaration filed on November 5, 2007 has been fully considered but does not place the application in allowable condition.

The declarant states that the droplet distribution range of the discontinuous phase and the average particle size of the emulsifying crosslinked siloxane elastomer, "unlike conventional surfactants" are not obvious. However, the instant claims are open to include surfactants other than the emulsifying elastomers, and the prior art teaches the same type of siloxane elastomers that are used in the present invention. There is no patentable distinction seen between the present invention and the compositions that are made according to the teachings of the prior art. Although applicants assert that the sensory benefits of the present invention are also unexpected, it is viewed that a skilled artisan would have obviously observed the characteristics of the compositions made according to the teachings of the prior art.

***Response to Arguments***

Applicant's arguments filed on November 5, 2007 have been fully considered but they are not persuasive.

Applicant's arguments regarding the obviousness rejection made in view of Tachibana are unpersuasive for the reasons stated above, in Oath/Declaration.

Applicant's arguments regarding the obviousness rejection made over Tachibana in view of Hawley rely on the merits of the previous arguments, which are viewed unpersuasive.

***Conclusion***

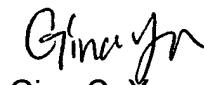
No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gina C. Yu whose telephone number is 571-272-8605. The examiner can normally be reached on Monday through Friday, from 8:00AM until 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1617

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Gina C. Yu  
Patent Examiner